

Chair, Cabinet National Security Committee

Intelligence and Security in a Free Society: Report of the first Independent Review of Intelligence and Security in New Zealand

Paper One: Overview and Key Issues

Proposal

- 1 The report of the independent reviewers (the report) appointed under the Intelligence and Security Committee Act 1996 to review the legislative framework governing the security and intelligence agencies was submitted to the Intelligence and Security Committee (ISC) on 29 February 2016.
- 2 The National Security Committee will consider a suite of six papers over its next two meetings. The first three papers will deal with the following:
 - 2.1 Paper One: overview and key issues, providing a summary of the independent reviewers' report, the objectives and principles guiding the government response to the review, the key issues determining the scope of activity of the agencies including the question of whether there is a bar on collection of intelligence in relation to New Zealanders (along the lines of section 14 of the Government Communications Security Bureau Act 2003), together with general legislative, implementation and fiscal issues;
 - 2.2 Paper Two: a new warranting and authorisation regime, including Ministerial Policy Statements, urgency, the role of judicial commissioners, and cooperation with New Zealand Police and the New Zealand Defence Force;
 - 2.3 Paper Three: better oversight and transparency.
- 3 The following further suite of papers will be considered at NSC's May meeting:
 - 3.1 Paper Four: institutional reform of the security and intelligence agencies, appointment of judicial commissioners, and general administrative matters;
 - 3.2 Paper Five: other issues relating to the activities of the agencies, including cover and immunities, and information sharing;
 - 3.3 Paper Six: generic legislative issues and consequential amendments, including countering foreign terrorist fighters provisions.
- 4 A further paper will report back on any matters arising from the present suite of papers and any changes proposed as a result of the consultation currently being undertaken by the Minister Responsible for the GCSB and in Charge of the NZSIS with other political parties.

- 5 Cabinet is asked to make a series of policy decisions that will enable drafting instructions to be given to the Parliamentary Counsel Office for the preparation of an Intelligence Services and Oversight Bill and enable officials to begin preparatory work for implementation of the package.

Executive Summary

- 6 The Intelligence and Security Committee Act 1996 requires periodic reviews of the intelligence and security agencies, the legislation governing them, and their oversight legislation. The reviews are to be conducted by two persons appointed by the Attorney-General in accordance with terms of reference set by the Attorney-General. The first review reported to ISC on 29 February 2016. The reviewers' report contains 107 recommendations, including a proposal to replace the legislation governing the agencies and their oversight agencies with a single Act.
- 7 There has been much change in comparable jurisdictions around the powers of security and intelligence agencies in recent years. The threat environment has also been fluid over this period, albeit threats faced by allies have increased, and in many cases increased substantially.
- 8 New Zealand's legislation is in need of updating, with the New Zealand Security and Intelligence Service Act 1969 being predominantly focused on warranting processes, and not reflecting the core business of a human intelligence agency.
- 9 There has also been significant technological change that impacts on the work of both agencies, giving rise to a need to ensure the legislative framework is flexible and able to accommodate future developments, while also remaining technology-neutral.
- 10 The reviewers have also sought to remove unnecessary barriers to cooperation between the agencies and to enhance transparency and accountability around their activities. Their report recommends that the New Zealand Security and Intelligence Service Act 1969, the Government Communications Security Bureau Act 2003, the Intelligence and Security Committee Act 1996, and the Inspector-General of Intelligence and Security Act 1996 be replaced with a single Act consolidating the objectives, functions and powers of the agencies and the arrangements for their oversight into a single act.

Background

- 11 The Government Communications Security Bureau and Related Legislation Amendment Bill 2013 was narrowly focused on issues of immediate concern, namely ensuring that the legislative framework governing the GCSB was clearly formulated and provided for the Bureau's activities. Amendments to the Intelligence and Security Committee Act were added by supplementary order paper during the Committee of the Whole stage of that Bill, providing for 5-7 yearly reviews of the legislation governing the security and intelligence agencies and their oversight bodies.
- 12 Sir Michael Cullen and Dame Patsy Reddy were appointed by the Acting Attorney-General in May 2015 to conduct the first review under the Intelligence and Security Committee Act. The reviewers received public submissions and consulted widely on the review.
- 13 The terms of reference for the review set out the purpose of the review as being to determine whether:

- 13.1 the legislative frameworks of the agencies are well placed to protect New Zealand's national security, while protecting individual rights; and
- 13.2 the current oversight arrangements provide sufficient safeguards at an operational, judicial and political level to ensure the agencies act lawfully and maintain public confidence.
- 14 The Acting Attorney-General also specified certain matters that the reviewers should take into account, including that "traditionally, signals and human intelligence have been carried out separately and the Government does not intend to consider merging those functions within a single agency."
- 15 The reviewers' report was submitted to ISC on 29 February 2016 and tabled in Parliament by ISC on 9 March 2016.
- 16 Provisions that were put in place by the Countering Foreign Terrorist Fighters Legislation Bill in 2014 will expire on 31 March 2017. Accordingly, the legislation to implement the review will need to be enacted by that date.
- 17 A Government response to the Law Commission's report *The Crown in Court: A review of the Crown Proceedings Act and national security information in proceedings* is currently being developed with the Ministry of Justice taking the lead. There are links between the issues in the reviewers' report and the Law Commission's report and the Government responses will need to be coordinated to ensure a consistent and coherent approach.

Comment

Overview of reviewers' report and key themes

- 18 The reviewers have recommended that the agencies, their oversight bodies, and potentially also intelligence assessment, be covered by a single, comprehensive piece of legislation.
- 19 The recommendations in the reviewers' report can be grouped under the following headings:
- 19.1 Institutional arrangements, with a view to bringing the intelligence agencies into the normal state sector arrangements, with exceptions as appropriate;
- 19.2 Bringing the intelligence agencies under a single Act, including shared objectives and functions and a single warranting and authorisation regime, and enabling better cooperation between the agencies;
- 19.3 Addressing a number of issues in legislation for the first time, including bringing human intelligence within the legislative framework and providing for certain issues relating to access to and sharing of information; and
- 19.4 Enhancing oversight and safeguards through strengthening and clarifying the Inspector-General's oversight of the agencies, expanding the role of the ISC, and provision for a judicial role with the warranting and authorisation framework.

- 20 The reviewers identified a number of deficiencies in the agencies' current legislative frameworks, including gaps in coverage, a lack of consistency between the two Acts, difficulties of interpretation, and a failure to keep pace with technological change.
- 21 Their report focuses on removing unnecessary barriers to effective cooperation between the agencies, while also emphasising the importance of ensuring the public can have confidence that the agencies will act lawfully and appropriately through greater transparency and enhanced oversight. Importantly, the reviewers recommend a comprehensive and consistent authorisation regime for both agencies that requires some form of authorisation for all of the agencies' intelligence collection and protective security activities that involve gathering information about individuals and organisations. (That aspect of the report is dealt with comprehensively in Paper two of this suite of papers.)

Objectives and guiding principles for Government response to the review

- 22 Our objectives for the Government response to the review are:
- 22.1 Building public trust and confidence in the intelligence and security agencies through a full, open and unclassified policy process, with effective and informed public engagement;
 - 22.2 Ensuring the new legislative framework is adaptable to changing circumstances and is technology-neutral;
 - 22.3 Reflecting New Zealand's long standing commitment to human rights, democracy, accountability and the rule of law;
 - 22.4 Promoting effective, clear and easy to understand legislation;
 - 22.5 Developing a framework that facilitates effective engagement and cooperation with New Zealand's international security partners;
 - 22.6 Promoting a joined-up and efficient New Zealand Intelligence Community that engages effectively with domestic agencies, including law enforcement agencies; and
 - 22.7 Strengthening and promoting a bi-partisan consensus on intelligence and security issues.
- 23 In view of these objectives, officials have applied to the following principles in developing the government response:
- 23.1 The proposed changes will need to be articulated publicly in an unclassified and easily understood way; and
 - 23.2 The Government response should be realistic, with an ongoing review mechanism in the Intelligence and Security Committee Act 1996 (and any replacement legislation) allowing for reform and adaptation in an incremental and manageable way, meaning that the response to this review does not need to resolve every issue identified at this time. (This is apparent in the reviewers' approach in that they have identified some issues where they have not made a

recommendation but rather have suggested that there may be scope for addressing the issue in the next periodic review.)

- 24 We propose that Cabinet agree to these objectives and principles to guide the ongoing work to progress and implement the Government response to the review.

Overview of Government response to review

- 25 The recommendations in the reviewers' report have been developed as a package. For this reason, we have approached them on the basis the recommendations should be adopted in some form unless good reason to diverge from the recommended approach exists.
- 26 In some areas of the report, the recommendations are made at a very high level and it has been necessary to carry out significant policy work to fill in and give effect to the recommendations. One area in particular where this has been so is in relation to the warranting and authorisation regime, which is addressed in Paper two of this suite of papers.
- 27 Finally, we note that the reviewers' terms of reference explicitly ruled out a merger of the NZSIS and the GCSB. We consider continued separation of the two agencies and their specific capabilities to be appropriate. For this reason, we propose to maintain appropriate distinctions in the powers available to each of the agencies.

A single Act and purpose

- 28 The reviewers recommended that the objectives, functions and powers of the agencies and their oversight should be consolidated into a single Act with the purpose of that Act being "to protect New Zealand as a free, open and democratic society."
- 29 We consider there is considerable merit in a single Act and purpose. In particular, a single Act will make clear the consistency of purpose and linkages across the New Zealand intelligence community, including supporting greater cooperation between the agencies and with other government agencies to ensure the agencies' shared objectives (discussed below) and the national intelligence priorities are achieved. The reviewers also see a single Act making the framework more accessible to the public and enabling a consistent set of principles to be applied to both the agencies and their oversight.
- 30 We propose that an Intelligence Services and Oversight Bill be developed to replace the New Zealand Security Intelligence Service Act, the Government Communications Security Bureau Act, the Inspector-General of Intelligence and Security Act, and the Intelligence and Security Committee Act.
- 31 In terms of the formulation of the purpose of the Act, we propose that the Committee largely adopt the proposed purpose put forward by the reviewers, so that it is "to secure New Zealand as a free, open and democratic society" (the reviewers suggested "to protect New Zealand ..."). We prefer 'secure', because 'protect' seems too passive – and, while the agencies do not have law enforcement functions, we do not want them to have to wait for a threat to materialise before they can become involved.
- 32 Consistent with this proposed purpose, we are recommending the carrying over of certain provisions in the New Zealand Security Intelligence Service Act and the Government Communications Security Bureau, including those requiring the agencies to

maintain political neutrality; limiting surveillance on the basis of the exercise the right to lawful advocacy, protest or dissent; and to brief the Leader of the Opposition, amongst others. Consequently, we are also recommending a change to the definition of “national security” that has been proposed by the reviewers (discussed further below).

The role, objectives and functions of the intelligence and security agencies

- 33 The way in which the agencies’ objectives and functions are framed will set the boundaries for their legitimate areas of activity and allow for the chief executives of the agencies to be held accountable by the State Services Commissioner for their individual and collective performance.
- 34 The reviewers note that the agencies have separate functions and different ways of operating due to their distinct histories and the two different legislative regimes. Differences in the warranting and authorisation regimes in the two Acts, for example, have hampered their ability to work together effectively to protect New Zealand against security threats. The reviewers also note the increasing challenges posed by modern communications technology and the blurring of national boundaries, which have changed the nature of security threats and the means by which these need to be countered. As a result of these factors, there is an increasing need for intelligence and security agencies to work together and pool their expertise. For example, human sources may provide initial leads by detecting suspicious behaviour and alerting authorities, and signals expertise can establish the identity of potential wrongdoers. Signals expertise can also assist human sources to assess a target’s intentions.
- 35 The reviewers see the agencies’ *current* functions as falling into the following categories:
- 35.1 Collecting information – this is the primary function of both agencies, with the NZSIS primarily collecting information for the purpose of protecting against threats to New Zealand (whether domestic or foreign in nature) and the GCSB having a broader mandate to collect information (albeit limited in terms of its ability to collect information about New Zealanders by section 14 of the Government Communications Security Bureau Act, which is discussed further below).
 - 35.2 Assisting other government agencies – unlike the GCSB, the NZSIS does not have a specific statutory function of assisting other agencies, although it can cooperate with other agencies to the extent that is practicable and necessary to assist the NZSIS in the performance of its own functions. The reviewers saw this as too restrictive.
 - 35.3 Protective security – these are functions focused on ensuring the security of people, information and physical resources. The agencies’ protective services are provided to both government (e.g. NZSIS vetting for security clearance) and to private sector entities (e.g. the GCSB’s cyber security role).
- 36 The reviewers concluded that there were no problems with the scope of the agencies’ combined current objectives. They see no reason to maintain the differences between the two agencies’ objectives and consider that both agencies should be able to assist the government in protecting and advancing New Zealand’s interests, and their objectives should reflect that. The reviewers propose common objectives and that the agencies carry out their functions in pursuit of those objectives only. The objectives proposed by the reviewers are that the agencies contribute to:

- 36.1 The protection of New Zealand's national security, including its economic security and the maintenance of international security (which can indirectly affect domestic security);
- 36.2 New Zealand's international relations and well-being; and
- 36.3 New Zealand's economic well-being.
- 37 The reviewers noted that the agencies' primary role is to use their specialist capabilities to collect intelligence and to make it available to agencies whose role it is to act on it. As for the agencies' functions, the reviewers concluded that their role as specialist "collection agencies" should continue, with the separation of collection of intelligence from decision-making and enforcement being an important check on the power of the state over individuals. Section 4(2) of the New Zealand Security Intelligence Service Act, providing that it is not a function of the NZSIS to enforce measures for security, should be retained and applied to both agencies.
- 38 However, the GCSB's role in proactively protecting information systems from cyber-attacks is recognised as a limited exception to this and the reviewers consider that this role is appropriate and should continue.
- 39 In line with the common objectives they have proposed, the reviewers have recommended the following shared functions for the agencies:
- 39.1 Collecting and analysing intelligence in accordance with the government's priorities, which includes provision of any intelligence collected and analysis of that intelligence to the Minister, the National Assessments Bureau, and any other person, office holder, entity or class of persons, office holders, or entities authorised by the Minister to receive the intelligence.
- 39.2 Providing protective security advice and assistance to other entities, including cooperating with, advising, and assisting public authorities and any other person entity or class of persons, office holder, or entities authorised by the Minister in relation to protective security matters.
- 39.3 Cooperating with and assisting other specified government agencies. In particular, this would include cooperating with each other, and with New Zealand Police and the NZDF, and assisting those agencies to carry out their functions (when assisting another agency in this way, the agencies will be required to act within the scope of that other agency's statutory powers and any relevant warrants, as is the case with the GCSB's current assistance mandate). It would also include cooperating and assisting any other government agency or entity where necessary to respond to an imminent threat to the life or security of a New Zealander overseas or any person in New Zealand or on the high seas.
- 40 Within the protective security function, there will be specialist functions that are specific to each of the agencies i.e. vetting services and protective security requirements provided by the NZSIS, and cyber security and information assurance services by the GCSB. The NZSIS will also retain its specific recommendatory function under the Citizenship Act 1977 and the Immigration Act 2009.
- 41 The NZSIS does not currently have an assistance function, although it does cooperate when that is consistent with its security intelligence function. However, the reviewers

consider that it would be preferable for any assistance function to be explicitly stated on the face of the legislation. The reviewers also recommend that, as a matter of practice, the agencies should develop joint operating protocols with other government agencies, such as the New Zealand Police. We support this recommendation. We propose that the Committee agree to the common objectives and functions proposed by the reviewers. We also propose that the protections in section 2(2) (limitation on the NZSIS instituting surveillance of any person or entity or class thereof on the basis of the exercise of their right to lawful advocacy, protest or dissent) and section 4AA(1) (replicated in section 8D(3) of the Government Communications Security Bureau Act) and (2) (political neutrality of the NZSIS) of the New Zealand Security Intelligence Service Act be carried over to the new legislation and applied to both agencies.

- 42 We also propose that the requirement in section 4AA(3) of the New Zealand Security Intelligence Service Act (replicated in section 8D(4) of the Government Communications Security Bureau Act) for the Director to consult regularly with the leader of the opposition for the purpose of keeping him or her informed about matters relating to national security should be carried over and applied to the Directors of both agencies.

Definition of “national security”

- 43 Also key to defining the scope of activities of the agencies is the definition of “national security”. This is particularly important as the reviewers propose a distinction between protecting national security and the agencies’ other objectives for the purpose of collecting information about New Zealanders (something that is discussed in detail in Paper two of this suite of papers).
- 44 The reviewers note that the Government uses an “all hazards” cross-government approach to defining national security. They propose that, for the purpose of the new legislation and setting out the functions of the agencies, the definition of “national security” should be considerably narrower. This will not affect the broader definition used in that cross-government coordination and planning context.
- 45 The reviewers have proposed a definition that is restricted to *protecting* as opposed to *advancing* New Zealand’s interests, including its economic and international security. The specific definition proposed is as follows:

“National security” means the protection against –

- Threats or potential threats, to New Zealand’s status as a free and democratic society from:
 - Unlawful acts, or
 - Foreign interference;
- Imminent threats to the life and safety of New Zealanders overseas;
- Threats, or potential threats, that may cause serious harm to the safety or quality of life of the New Zealand population;
- Unlawful acts, or acts of foreign interference, that may cause serious damage to New Zealand’s economic security or international relations;

- Threats, or potential threats, to the integrity of information or infrastructure of critical importance to New Zealand;
- Threats, or potential threats, that may cause serious harm to the safety of a population of another country as a result of unlawful acts by a New Zealander that are ideologically, religiously or politically motivated;
- Threats, or potential threats, to international security.

46 This definition differs from the current definition of “security” in the New Zealand Security Intelligence Service Act. For that reason, we are concerned that it cover, clearly and transparently, activities such as terrorism and sabotage, weapons proliferation, activity by foreign intelligence agencies against New Zealand, interference in New Zealand’s democracy by foreign governments, New Zealand’s international and economic well-being, the safety of New Zealanders overseas, the protection of sensitive government information, and contributing to international security.

47 We have directed officials to report back further on this matter in May. We expect that the recent work on the national intelligence priorities will be relevant, and consultation with all agencies affected by the national intelligence priorities will be necessary.

Section 14 of the Government Communications Security Bureau Act

48 The reviewers have recommended removal of section 14 of the Government Communications Security Bureau Act, thus giving the New Zealand government the ability to learn of and respond to all threats to New Zealand’s national security, regardless of the nationality of those involved.

49 There are a number of situations where the Government has a legitimate interest in being able to use the capabilities of the GCSB but is prevented from doing so because of section 14. Examples include:

- *New Zealand Government knows about some New Zealanders fighting overseas with groups like ISIL, but it is almost certain there are others doing the same thing and we need to identify them to respond to the threat they pose to NZ and other countries. In this type of case, we may not know who these people are or we may only hold fragments of information about them.*
- *New Zealand Government receives information indicating that a person who might be a New Zealander has attended a terrorist training facility in Syria. This fragment is the only information available. We need to identify the person in order to respond to the threat they pose to NZ and other countries.*

50 An appendix to this paper sets out the particular problems with each of these examples and the way in which each would be dealt with under the reviewers’ proposed regime.

51 On its face, section 14 prevents the GCSB from taking any action for the purpose of intercepting New Zealanders’ private communications when performing its intelligence function. This is so even where that information would be relevant to the performance of the GCSB’s foreign intelligence function. In short, the reviewers consider that the section 14 restriction is confusing, does not protect New Zealanders to the extent that it suggests, and hinders the agencies’ ability to assist the government to protect New Zealand against security threats.

- 52 The reviewers point out that the section 14 restriction is not as comprehensive as it is commonly understood. In particular, it only applies when the GCSB is performing its intelligence function and not its cyber security and assistance functions. It does not expressly cover New Zealand organisations (only citizens and permanent residents) and is subject to an exception in relation to New Zealanders who are an “agent of a foreign power” (e.g. a New Zealand citizen working for a foreign government, foreign corporation, or international organisation). Further, the restriction only applies to “private” communications (the definition of what a private communication is in itself a quagmire). Moreover, it does not prevent incidental interception of New Zealanders’ communications. Incidentally obtained communications may only be retained or disclosed in accordance with the Act. Moreover, the reviewers note that the grounds for retention are quite broad.
- 53 The reviewers note that the “agent of a foreign power” exception has proven difficult for the GCSB to apply in practice. They give the example of a lead that is general in nature – that a person who appears to be a New Zealander is located in an area occupied by a terrorist organisation. That information may be insufficient to establish whether the person in question is an agent or representative of that terrorist group (which would be a foreign organisation for the purpose of the Act). In that situation, the GCSB cannot use its unique capabilities to investigate further. While this lead might be referred to the NZSIS, the NZSIS may not be able to pursue it further: it can only obtain a warrant if it is able to identify the person.
- 54 The 2013 amendments to the Government Communications Security Bureau Act included the insertion of section 8C, which was intended to allow the GCSB to cooperate with other entities. Specifically, section 8C allows the deployment of GCSB capabilities to assist the other entity to perform its own functions. Taking the example in the preceding paragraph, if the NZSIS were able to obtain a warrant to collect intelligence about the suspected New Zealand person, then the GCSB might, through section 8C, be able to assist. However, the NZSIS can only get a warrant where the identity of the person is known. Further, where the GCSB is using its assistance power pursuant to section 8C, it is limited by the scope of the other agency’s power or authorisation, and may be unable to use all of its tools and techniques. There are cases where this can be a substantial limitation. For this reason, section 8C is inadequate to deal with situations where the risk is unknown or not identifiable, as the other agency probably will not be able to get a warrant.
- 55 Domestic security threats are increasingly “going dark” through the use of communication systems that are not susceptible to conventional interception by the NZSIS or the NZ Police. The capabilities of the GCSB could be useful to overcoming this challenge. However, section 14 constrains their use, and section 8C does not provide a sufficiently certain legal basis for GCSB assistance where good reason to use the GCSB’s capabilities exists. The case studies in the Appendix to this paper demonstrate the particular limitations with section 8C.
- 56 There are also practical difficulties for the GCSB in implementing section 14 effectively. It is very difficult to assess the nationality of a person when intercepting modern communications, especially where the person may only be identifiable by an online persona. New Zealanders (including dual nationals) are also present in almost every country. The GCSB necessarily and appropriately takes a cautious approach, which further limits its ability to target known or potential threats.

- 57 The reviewers propose that the special protection for the interests of New Zealanders should instead be implemented through a strengthened authorisation framework. This would require a warrant approved by both the Attorney-General and a judicial commissioner if the agencies wanted to carry out any activity for the purpose of targeting someone reasonably believed to be a New Zealander, and would need to be carried out for national security purposes. The authorisation framework and the warranting process are dealt with in detail in Paper two of this suite of papers.
- 58 This would ensure enhanced scrutiny of any proposed collection of intelligence for the purpose of targeting a New Zealander by either agency, while at the same time, ensuring that the agencies are able to assist the government to protect national security by collecting information in circumstances where the GCSB's valuable tools are unable to be used at present.
- 59 We recommend that the Committee agree to give the agencies the ability to respond to threats to New Zealand, regardless of the nationality of those implicated in the threat, and to increase the protection given to the interests of New Zealanders in the way proposed by the reviewers. That is, through the removal of section 14 and the requirement for both agencies to obtain a warrant approved by the Attorney-General and a judicial commissioner if they propose carrying out any activity for the purpose of targeting a New Zealander.
- 60 The reviewers considered that removing the "agent of a foreign power" exception may cause difficulty as there may be circumstances in which it may be necessary to target a New Zealander linked with a foreign entity for purposes that are broader than national security. They give the example of a New Zealander who holds an influential position in, or owes allegiance to a foreign government or a terrorist organisation. That person may be the best (or even only) source of information about intended actions by that government or organisation which may have a significant impact on New Zealand's trade or foreign policy.
- 61 The reviewers note that the current definitions of "foreign person" and "foreign organisation" were inserted for a different purpose than that which they would fulfil under the proposed new regime. In particular, they consider that the current definitions are too wide and may cover New Zealanders in situations which are not appropriate. For this reason, the reviewers recommend that the Government review the definitions of "foreign person" and "foreign organisation" in order to narrow the circumstances in which they can apply to New Zealand citizens and permanent residents.
- 62 We propose that officials consider these definitions further so that the scope of "the agent of a foreign power" exception can be addressed in Paper six of the suite of papers (to be considered by the Committee at its May meeting).
- 63 We recognise that this is a contentious area, and of all the issues raised by the review, this has attracted most of the comment to date. We are comfortable, however, that this provides a fair balance between the responsibility of the New Zealand government to keep New Zealanders safe, and the rights of New Zealand citizens and permanent residents not to have their communications intercepted without good cause.

The Attorney-General's role

- 64 As discussed in Paper Two, the reviewers recommended that the Attorney-General, rather than the Minister responsible for the agencies, should approve warrants. They

considered that as the principal law officer of the Crown, he or she is the appropriate member of the executive branch to take into account human rights implications and to ensure that the rule of law is upheld. They did not see any problem with the Attorney-General also being concurrently Minister responsible for the agencies, noting that this would allow the Attorney-General to develop a greater understanding of the agencies' activities and the broader environment in which they operate. We agree with these recommendations.

Implementation issues

Intelligence Services and Oversight Bill

- 65 We propose that an Intelligence Services and Oversight Bill be drafted to implement the recommendations contained in this suite of papers that have legislative implications. It must be passed by 31 March 2017 as this is the date that provisions introduced by the Countering Terrorist Fighters Legislation Bill expire.
- 66 The legislation will have the following main components:
- 66.1 Continuation and constitution of the NZSIS and the GCSB, with
 - 66.1.1 The NZSIS becoming a public service department (with appropriate carve outs);
 - 66.1.2 The Director of Security and the Director of the GCSB becoming public service chief executives;
 - 66.2 Warranting and authorisation regime, including the Judicial Commissioners, and register and reporting requirements;
 - 66.3 Miscellaneous matters related to, or arising from, the agencies' activities and functions, including information sharing, arrangements with foreign partners, cover for operations and employees, and immunities.
 - 66.4 Continuation and enhancement of the key oversight mechanisms, the Inspector-General of Intelligence and Security and the Intelligence and Security Committee;
 - 66.5 Offences, transitional provisions and consequential amendments; and
 - 66.6 Countering foreign terrorist fighter provisions.

Work programme to implement the Intelligence Services and Oversight Bill

- 67 The proposals in the independent reviewers' report will have significant operational impacts and will require an extensive programme of work to ensure they are implemented fully by the date that part of the Bill commences (1 December 2017) and manage risks associated with the changes (noting that part of the Bill will commence earlier, to ensure there is no legislative gap around countering foreign terrorist fighters). We are proposing that the NZSIS and the GCSB commence planning and development of an implementation work programme alongside the development and progress of the Bill.
- 68 In particular, the NZSIS and the GCSB, in consultation with officials from the Department of the Prime Minister and Cabinet, the Treasury and the State Services Commission,

should report to the Minister in Charge of the NZ Security Intelligence Service and the Minister Responsible for the GCSB by 1 August 2016 on a joint work programme to implement the Intelligence Services and Oversight Bill. Other agencies will be consulted on the development of the joint work programme as relevant.

- 69 This implementation work programme should set out the work streams and resourcing necessary to implement the following matters:
- 69.1 The agencies being subject to the State Sector Act (including the associated application of the Employment Relations Act 2000), such as the development of a code of conduct and comprehensive employment relations policies;
 - 69.2 Ministerial Policy Statements, which will set the parameters for all lawful activities carried out by the agencies in pursuit of their security and intelligence functions (as detailed in Paper two of this suite of papers);
 - 69.3 Development of internal warranting and authorisation processes to ensure compliance with the new statutory regime;
 - 69.4 Development of policies and processes to support better coordination and cooperation between the agencies, with particular reference to the authorisation regime; and
 - 69.5 Any other matters that might appropriately be brought into this implementation workstream.

Consultation

- 70 The following agencies have been consulted on this paper: the NZSIS; the GCSB; NZ Police; NZDF; the Ministries of Foreign Affairs and Trade; Defence; Justice; Primary Industries; Business, Innovation, and Employment; the State Services Commission; the Treasury; the NZ Customs Service; the Department of Internal Affairs; and the Crown Law Office.

Financial Implications

- 71 To the extent there are fiscal implications flowing from the decisions in this suite of papers, these will be absorbed within new baselines.
- 72 In Paper 3 (Oversight and transparency), we propose accepting the recommendation to fund the office of the Inspector-General of Intelligence and Security through its own appropriation, rather than via the Ministry of Justice. We note also that the agencies have been directed to address resourcing implications in the implementation work programme, which is to be developed in consultation with the Department of the Prime Minister and Cabinet, the State Services Commission and the Treasury.

Human Rights

- 73 The activities of the agencies are by their very nature highly intrusive and as such raise a number of issues of consistency with the New Zealand Bill of Rights Act 1990. The Department of the Prime Minister and Cabinet will work closely with the Ministry of Justice during the drafting process to ensure that the policy proposals in this suite of

papers is implemented in a way that achieves overall consistency with the Bill of Rights Act.

Legislative Implications

- 74 As noted above, the recommendations in this suite of papers with legislative implications will be implemented in the Intelligence Services and Oversight Bill.
- 75 The Intelligence Services and Oversight Bill has been included on the 2016 Legislation Programme with a category 3 priority (to be passed if possible in 2016). We intend that the Bill be introduced before the end of June 2016 and enacted by 28 February 2017.
- 76 The Bill will contain a provision binding the Crown.

Regulatory Impact Analysis

- 77 A full regulatory impact statement will be provided with the second suite of Cabinet papers that will be considered by the Committee at its May meeting.

Publicity

- 78 There has been considerable publicity focused on the reviewers' report since it was tabled in Parliament on 9 March 2016. We anticipate that the Government response to the reviewers' report and the resulting legislation will also be keenly followed, with certain aspects likely to be controversial.
- 79 We propose that once the Bill is introduced, this suite of papers should be publicly released (subject to any appropriate and necessary redactions). We note that the Department of the Prime Minister and Cabinet intends to set up a website where information about the Bill will be made available for the purpose of informing interested members of the public and submitters on the Bill.
- 80 We also note that the Minister in Charge of the New Zealand Security Intelligence Service and Responsible for the GCSB intends to engage with a wide range of stakeholders during the passage of the Bill.

Recommendations

The Minister for National Security and Intelligence and the Minister Responsible for the GCSB and in Charge of the NZSIS recommend that the Committee:

Background

- 1 **note** that Sir Michael Cullen and Dame Patsy Reddy were appointed by the Acting Attorney-General in May 2015 to conduct the first periodic review under the Intelligence and Security Act 1996;
- 2 **note** that the terms of reference for the review set out the purpose of the review as being to determine whether:
 - 2.1 the legislative frameworks of the agencies are well placed to protect New Zealand's national security, while protecting individual rights; and

- 2.2 the current oversight arrangements provide sufficient safeguards at an operational, judicial and political level to ensure the agencies act lawfully and maintain public confidence;
- 3 **note** that the reviewers' report was submitted to ISC on 29 February 2016 and tabled in Parliament by ISC on 9 March 2016;
- 4 **note** that provisions that were put in place by the Countering Foreign Terrorist Fighters Legislation Bill in 2014 will expire on 31 March 2017 and therefore legislation to implement the review will need to be enacted by that date;

Overview of reviewers' report and key themes

- 5 **note** that the reviewers have recommended that the agencies, their oversight bodies, and potentially also intelligence assessment, be covered by a single, comprehensive piece of legislation;
- 6 **note** that key themes in the reviewers' report include:
- 6.1 removing unnecessary barriers to effective cooperation between the agencies;
- 6.2 emphasising the importance of ensuring the public can have confidence that the agencies will act lawfully and appropriately through greater transparency and enhanced oversight;
- 6.3 a comprehensive and consistent authorisation regime for both agencies that requires some form of authorisation for all of the agencies' intelligence collection and protective security activities that involve gathering information about individuals and organisations (dealt with in paper two of this suite of papers);

Objectives and guiding principles for Government response to the review

- 7 **agree** that the objectives for the Government response to the review are:
- 7.1 Building public trust and confidence in the intelligence and security agencies through a full, open and unclassified policy process, with effective and informed public engagement;
- 7.2 Ensuring that the new legislative framework is adaptable to changing circumstances and is technology-neutral;
- 7.3 Reflecting New Zealand's long standing commitment to human rights, democracy, accountability and the rule of law;
- 7.4 Promotion of effective, clear and easy to understand legislation;
- 7.5 Development of a framework that facilitates effective engagement and cooperation with New Zealand's international security partners;
- 7.6 Promotion of a joined-up and efficient New Zealand Intelligence Community that engages effectively with domestic agencies, including law enforcement agencies;
- 7.7 Strengthening and promoting a bi-partisan consensus on intelligence and security issues;

- 8 **agree** that in light of the objectives in paragraph 89, the following principles should guide the ongoing work to progress and implement the Government response to the review:
- 8.1 The proposed changes will need to be articulated publicly in an unclassified and easily understood way; and
 - 8.2 The Government response should be realistic, with an ongoing review mechanism in the Intelligence and Security Committee Act 1996 (and any replacement legislation) allowing for reform and adaptation in an incremental and manageable way (meaning that the response to this review does not need to resolve every issue identified at this time);

A single Act and purpose

- 9 **agree** that an Intelligence Services and Oversight Bill be developed to replace the New Zealand Security Intelligence Service Act, the Government Communications Security Bureau Act, the Inspector-General of Intelligence and Security Act, and the Intelligence and Security Committee Act;
- 10 **agree** that the Intelligence Services and Oversight Bill should have as its purpose: “to secure New Zealand as a free, open and democratic society”;

The objectives and functions of the agencies

- 11 **agree** that the shared objectives of the NZSIS and the GCSB should be:
- 11.1 the protection of New Zealand’s national security, including its economic security and the maintenance of international security;
 - 11.2 New Zealand’s international relations and well-being;
 - 11.3 New Zealand’s economic well-being;
- 12 **agree** the shared functions of the NZSIS and the GCSB should be:
- 12.1 Collecting and analysing intelligence in accordance with the government’s priorities, which includes provision of any intelligence collected and analysis of that intelligence to the Minister, the National Assessments Bureau, and any other person, office holder, entity or class of persons, office holders, or entities authorised by the Minister to receive the intelligence;
 - 12.2 Providing protective security advice and assistance to other entities, including cooperating with, advising, and assisting public authorities and any other person entity or class of persons, office holder, or entities authorised by the Minister in relation to protective security matters;
 - 12.3 Cooperating with and assisting other specified government agencies. In particular, this would include cooperating with each other, and with New Zealand Police and the NZDF, and assisting those agencies to carry out their functions (when the NZSIS and the GCSB are assisting another agency in this way, they will be required to act within the scope of that agency’s statutory powers and any relevant warrants, as is the case with the GCSB’s current assistance mandate). It would also include cooperating and assisting any other government agency or

entity where necessary to respond to an imminent threat to the life or security of a New Zealander overseas or any person in New Zealand or on the high seas;

- 13 **agree** that within the protective security function described above, there will be specialist functions that are specific to each of the agencies i.e. vetting services and protective security requirements provided by the NZSIS and cyber security and information assurance services provided by the GCSB;
- 14 **agree** that the NZSIS will also retain its specific recommendatory function under the Citizenship Act 1977 and the Immigration Act 2009;
- 15 **agree** that, as a matter of practice, the agencies should develop joint operating protocols with other government agencies, such as the New Zealand Police;
- 16 **agree** that the following provisions in the New Zealand Security Intelligence Service Act and the Government Communications Security Bureau Act be carried over to the Intelligence Services and Oversight Bill and applied to both agencies:
- 16.1 sections 2(2) and 4AA of New Zealand Security Intelligence Service Act;
- 16.2 section 8D(3) and (4) of the Government Communications Security Bureau;
- 17 **agree** that section 4(2) of the New Zealand Security Intelligence Service Act, providing that it is not a function of the NZSIS to enforce measures for security, should be retained and applied to both agencies (although the GCSB's role in proactively protecting information systems from cyber-attacks should continue);

Definition of "national security"

- 18 **note** that the reviewers have proposed that "national security" should be defined to mean:
- Threats or potential threats, to New Zealand's status as a free and democratic society from:
 - Unlawful acts, or
 - Foreign interference;
 - Imminent threats to the life and safety of New Zealanders overseas;
 - Threats, or potential threats, that may cause serious harm to the safety or quality of life of the New Zealand population;
 - Unlawful acts, or acts of foreign interference, that may cause serious damage to New Zealand's economic security or international relations;
 - Threats, or potential threats, to the integrity of information or infrastructure of critical importance to New Zealand;
 - Threats, or potential threats, that may cause serious harm to the safety of a population of another country as a result of unlawful acts by a New Zealander that are ideologically, religiously or politically motivated;

- Threats, or potential threats, to international security;

19 **direct** officials to consider the definition of “national security” proposed by the reviewers so that the definition can be addressed in Paper five of the second suite of papers (to be considered by the Committee at its May meeting);

Section 14 of the Government Communications Security Bureau Act

20 **note** that the reviewers have recommended the removal of section 14 of the Government Communications Security Bureau Act on the basis that it:

20.1 does not protect New Zealanders to the extent that it suggests;

20.2 hinders the agencies’ ability to assist the Government to protect New Zealand against security threats;

20.3 has been difficult to apply in practice;

21 **agree** that section 14 should not be replicated in the Intelligence Services and Oversight Bill but that there should be a requirement for both agencies to obtain a warrant approved by the Attorney-General and a judicial commissioner if they propose carrying out any activity for the purpose of targeting a New Zealander (discussed in further detail in Paper two of this suite of papers);

22 **note** that the reviewers have proposed that the “agent of a foreign power” exception to section 14 should be retained but as they consider it is currently too broadly cast, have recommended that the Government review the definitions of “foreign person” and “foreign organisation”;

23 **direct** officials to consider the definitions referred to in paragraph 22 above further so that the scope of “the agent of a foreign power” exception can be addressed in Paper five of the second suite of papers (to be considered by the Committee at its May meeting);

Implementation issues

24 **agree** that the Intelligence Services and Oversight Bill should have the following main components:

24.1 Continuation and constitution of the NZSIS and the GCSB, with

24.1.1 The NZSIS becoming a public service department (with appropriate carve outs);

24.1.2 The Director of Security and the Director of the GCSB becoming public service chief executives;

24.2 Warranting and authorisation regime, including the Judicial Commissioners, and register and reporting requirements;

24.3 Miscellaneous matters related to, or arising from, the agencies’ activities and functions, including information sharing, arrangements with foreign partners, cover for operations and employees, and immunities.

- 24.4 Continuation and enhancement of the key oversight mechanisms, the Inspector-General of Intelligence and Security and the Intelligence and Security Committee;
- 24.5 Offences, transitional provisions and consequential amendments;
- 24.6 Countering foreign terrorist fighter provisions;
- 25 **agree** that the NZSIS and the GCSB, in consultation with officials from the Department of the Prime Minister and Cabinet, the Treasury and the State Services Commission, should report to the Minister in Charge of the NZ Security Intelligence Service and the Minister Responsible for the GCSB by 1 August 2016 on a joint work programme to implement the Intelligence Services and Oversight Bill;
- 26 **agree** that the implementation work programme referred to in paragraphs 67-69 should set out the work streams and resourcing necessary to implement the following matters:
- 26.1 The agencies being subject to the State Sector Act (including the associated application of the Employment Relations Act 2000), such as the development of a code of conduct and comprehensive employment relations policies;
- 26.2 Ministerial Policy Statements, which will be necessary for all activities carried out by the agencies in pursuit of their objectives and functions (as detailed in Paper two of this suite of papers);
- 26.3 Development of internal warranting and authorisation processes and systems to ensure compliance with the new statutory regime;
- 26.4 Development of policies and processes to support better coordination and cooperation between the agencies, with particular reference to the authorisation regime;
- 26.5 Any other matters that might appropriately be brought into this implementation workstream.

Financial implications

- 27 **note** that any fiscal implications of proposals in this suite of papers will be covered from within the agencies' baselines;

Legislative implications

- 28 **note** that the Intelligence Services and Oversight Bill has been included on the 2016 Legislation Programme with a category 3 priority (to be passed if possible in 2016);
- 29 **authorise** the Minister for National Security and Intelligence to issue drafting instructions to the Parliamentary Counsel Office to give effect to the recommendations in this suite of Cabinet papers;
- 30 **authorise** the Minister for National Security and Intelligence to make decisions consistent with the overall policy decisions in this suite of Cabinet papers on any issues that arise during the drafting process;

Publicity

- 31 **agree** that once the Bill is introduced, this suite of Cabinet papers should be publicly released (subject to any appropriate and necessary redactions);
- 32 **note** that the Department of the Prime Minister and Cabinet intends to set up an Internet site where information about the Bill will be made available for the purpose of informing interested members of the public and submitters on the Bill;
- 33 **note** that the Minister in Charge of the NZ Security Intelligence Service and Responsible for the GCSB intends to engage with a wide range of stakeholders as the Bill is progressed.

Rt Hon John Key
Minister for National Security and Intelligence

Hon Christopher Finlayson
Minister Responsible for the GCSB
Minister in Charge of the NZSIS

SECTION 14 CASE STUDIES

The discovery problem

New Zealand Government knows about some New Zealanders fighting overseas with groups like ISIL, but it is almost certain there are others doing the same thing and we need to identify them to respond to the threat they pose to NZ and other countries. In this type of case, we may not know who these people are or we may only hold fragments of information about them.

Under current legislation

- NZSIS cannot get an intelligence warrant because there is not enough information to identify the individuals the warrant would apply to.
- GCSB cannot search for the New Zealanders because that would breach section 14 and there is no information to support the legal test of “agent of a foreign power”.
- In these cases, for the GCSB to assist the NZSIS under section 8C, NZSIS needs to have a warrant. NZSIS cannot get warrant meaning GCSB cannot assist.

Under the reviewers’ proposed framework

- GCSB and/or NZSIS could obtain a tier 1 warrant to carry out the activity of searching for New Zealanders fighting overseas with groups like ISIL.
- Every tier 1 warrant is issued by both the Attorney-General and a Judicial Commissioner.
- A tier warrant can only be issued for a national security purpose which would be satisfied in these cases.

The tip-off problem

New Zealand Government receives information indicating that a person who might be a New Zealander has attended a terrorist training facility in Syria. This fragment is the only information available. We need to identify the person in order to respond to the threat they pose to NZ and other countries.

Under current legislation

- NZSIS cannot get an intelligence warrant because there is not enough information to identify the individual the warrant would apply to.
- GCSB cannot search for the New Zealanders because that would breach section 14 and there is no information to support the legal test of “agent of a foreign power”.
- In these cases, for the GCSB to assist the NZSIS under section 8C, NZSIS needs to have a warrant. NZSIS cannot get warrant meaning GCSB cannot assist.

Under the reviewers’ proposed framework

- GCSB and/or NZSIS could obtain a tier 1 warrant which would enable them to identify the New Zealander who attended the terrorist training camp or obtain information about that person.
- Every tier 1 warrant is issued by both the Attorney-General and a Judicial Commissioner.
- A tier warrant can only be issued for a national security purpose which would be satisfied in these cases.